

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES MONACO and KRISTINA MONACO, Husband and Wife,

Plaintiffs,

V.

No. C05-178Z

GARY LOCKE, Governor of the State of Washington; et al.,

Defendants.

I. INTRODUCTION

This matter comes before the Court on Defendants' Motion for Summary Judgment, docket no. 24. Having considered the briefs in support of and opposition to the motion, the Court now GRANTS this motion for the reasons stated in this Order.

II. BACKGROUND

Plaintiffs in this case are the maternal grandparents of two children, A.W. and A.M. Compl., docket no. 5, ¶ 3. The children were placed in foster care by Washington's Department of Social and Health Services (DSHS) after A.W. was removed from the care of Amy Monaco, one of Plaintiffs' adult daughters. Id. ¶¶ 18-21. Upon birth, A.M. was placed directly into foster care. Id. ¶ 21.

1 After the children were removed from Amy Monaco's care, A.W. was initially placed
 2 in the Plaintiffs' home. Compl., docket no. 5, ¶ 19. However, the child was removed
 3 shortly thereafter. Id. ¶ 20, 21.

4 Jenny King is a social worker who was assigned to the case. King Decl., docket no.
 5 26, ¶ 2. At the request of Amy Monaco and the Plaintiffs, Ms. King conducted a home visit
 6 to determine if Plaintiffs' home was suitable for long term placement of the children. King
 7 Decl., docket no. 26, ¶ 7. Ms. King recommended the children be placed in another home
 8 and declined to do a more extensive home study. Id. Upon review of the Plaintiffs' file, she
 9 found over twenty referrals were made to DSHS. Id. These referrals were "unfounded" in
 10 that DSHS never made a "founded" finding of abuse and neglect. Compl., docket no. 5, ¶ 7;
 11 Answer, docket no. 6, ¶ 7. Plaintiffs do not deny the referrals were made against them, and
 12 declare that they "received copies of the 'referrals' but from what we read in those the
 13 allegations do not justify what CPS is telling people about us," Monaco Decl., docket no. 36,
 14 ¶ 12. Ms. King's decision regarding placement was reviewed by her supervisor and
 15 evaluated by a prognostic staffing team made up of supervisors, social workers and
 16 professionals. King Decl., docket no. 26, ¶ 10.

17 Ms. King wrote a letter to the Monacos explaining why placement was denied. King
 18 Decl., docket no. 26. In the letter, she noted a history of non-cooperation with social
 19 workers and unresponsiveness to suggestions that Plaintiffs seek services for their children.
 20 Id. Ms. King did not specifically cite the unfounded referrals as reason for her placement
 21 decision; however, the referrals are what prompted the social worker visits and subsequent
 22 notes about poor cooperation and the lack of follow through. Id. Ms. King also ordered
 23 Plaintiff, Kristina Monaco, not to attend the visitation sessions between A.M. and Amy
 24 Monaco so that the mother and child could bond. Id.

25 There have been numerous state court proceedings regarding custody and placement
 26 of these children prior to this action, and on each occasion the judge upheld the state's

1 determination that it was not in the best interest of the children to live with Plaintiffs. Def.
 2 Mot., docket no. 24 at 3. In July 2002, Judge Armstrong ordered A.M. into DCFS
 3 (Department of Child Family Services) approved placement, docket no. 37 at 4. Plaintiffs
 4 filed a motion to intervene in the children's dependency hearing in November 2002, which
 5 was denied by Commissioner Hollis Holman, docket 25-2 at 10. Plaintiffs filed a motion to
 6 revise the Commissioner's ruling, which was denied. Id. at 11. Finally, Amy Monaco, the
 7 mother of the children, filed a motion for placement of her children with Plaintiffs. Id. at 13.
 8 Plaintiffs were witnesses in the hearing, but placement was again denied. Id. Plaintiffs
 9 subsequently filed this lawsuit in state court, and Defendants removed the case to this Court
 10 in January, 2005, docket no. 1.

11 Plaintiffs received an extension from the Court in which to file a Response to the
 12 Motion for Summary Judgment, docket no. 30. Despite the extension, the Response was still
 13 one day late and Plaintiffs requested another extension in order that the Court consider their
 14 tardy Response, docket no. 35.¹

15 **III. DISCUSSION**

16 Summary judgment is appropriate when there is no genuine issue as to any material
 17 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);
 18 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The party moving for
 19 summary judgment bears the burden of demonstrating the absence of a genuine issue of
 20 material fact based on the evidence before the court. Celotex Corp. v. Catrett, 477 U.S. 317,
 21 323 (1986). Once the moving party meets its initial responsibility, the burden shifts to the
 22 opposing party to establish that a genuine issue actually exists for a material fact. See
 23 Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).
 24 Evidence submitted by the party opposing summary judgment is presumed valid, and all
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26 ¹Defendants did not oppose the one-day extension Plaintiffs requested to file their Response.
 In order to decide the case on its merit, the Court GRANTS the Motion, docket no. 35.

1 reasonable inferences that may be drawn from that evidence must be drawn in favor of the
 2 party opposing summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255
 3 (1986). However, a party opposing a motion for summary judgment “may not rest upon the
 4 mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that
 5 there is a genuine issue for trial.” Id. at 248.

6 Defendants move this Court to grant summary judgment for failure to state a claim.
 7 Def. Mot., docket no. 24. Plaintiffs allege five causes of action: defamation; invasion and
 8 violation of privacy; violation of civil rights; conspiracy and conspiracy to violate civil
 9 rights; and intentional infliction of emotional distress. Compl., docket no. 5.

10 1. Defamation Claim

11 To defeat summary judgment, Plaintiffs must plead sufficient facts to establish the
 12 four elements of defamation: falsity, an unprivileged communication, fault, and damages.
 13 See Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981). The heart of
 14 Plaintiffs’ defamation claim appears to be DSHS’ alleged disclosure to a placement
 15 “prognostic staffing team” that there were over twenty referrals made about the Plaintiffs to
 16 DSHS, docket no. 5 at 10. Plaintiffs also allege DSHS “overtly and affirmatively recorded
 17 false information in their records regarding plaintiffs and refused to correct that false
 18 information.” Compl., docket no. 5, ¶ 28. However, besides this cursory pleading in the
 19 complaint, Plaintiffs have not provided the Court any particularity as to what false
 20 information may have been recorded by DSHS. The Plaintiffs declare that they “received
 21 copies of the ‘referrals’ but from what we read in those the allegations [they] do not justify
 22 what CPS is telling people about us.” Monaco Decl., docket no. 36, ¶ 12. Plaintiffs fail to
 23 tell the Court what untruthful information “CPS is telling people” with any particularity.

24 Even if these broad allegations sufficiently plead the element of falsity, the
 25 defamation claim fails because the communication was protected by a qualified privilege.
 26 Defendants assert qualified privilege exists because (1) Defendants were inferior state

1 officials, and (2) Defendants reasonably believed there were facts that another sharing a
 2 common interest was entitled to know, docket no. 24 at 7-8. The question of privilege is for
 3 the Court to decide as a matter of law. Gem Trading Co. v. Cudahy Corp., 92 Wn.2d 956,
 4 960, 603 P.2d 828 (1979). The Court concludes that as state actors, Defendants are entitled
 5 to a qualified privilege. Existence of qualified privilege shifts the burden to Plaintiffs who
 6 must show abuse of the privilege through “actual malice.” Parry v. Brown Assoc., Wn. App.
 7 193, 197, 730 P.2d 95 (1986). To prove actual malice, the plaintiff must show that the
 8 speaker knew the statement was false, acted with a high degree of awareness of its probable
 9 falsity, or in fact entertained serious doubts as to the statement’s truth. Herron v. King
 10 Broadcasting, 109 Wn.2d 514, 523, 746 P.2d 295 (1987).

11 Plaintiffs assert that Ms. King is not entitled to qualified immunity because she did
 12 not act in good faith. Plaintiffs argue Ms. King acted in violation of state law RCW
 13 26.44.020 which prohibits sharing “unfounded” referrals to child placing agencies when she
 14 disclosed the referrals to the prognostic staffing team, docket no. 32 at 7.² However, DSHS
 15 is statutorily allowed to “conduct ongoing case planning and consultation with those persons
 16 or agencies required to report under this section, with consultants designated by the
 17 department.” RCW 26.44.030(7). Given this statutory authorization to conduct case
 18 planning with department consultants, Ms. King’s disclosures during a prognostic staffing
 19 meeting cannot support a finding of actual malice. In addition, Plaintiffs fail to provide any
 20 evidence that shows the Defendants “entertained serious doubts as to the truth” of their
 21 communications about the Plaintiffs as required for a finding of actual malice. See Herron,
 22 109 Wn.2d at 523. Thus, the Court finds that the defamation fails because Defendants’
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24 ²The law states that “[n]o unfounded allegation of child abuse or neglect may be disclosed to
 25 a child-placing agency, private adoption agency, or any other provider licensed under chapter
 26 74.15 RCW.” RCW 26.44.020. A child-placing “agency” for purposes of this rule
 specifically excludes any “agency operated by any unit of local, state, or federal
 government.” RCW 74.15.020(2)(p).

1 communications were protected by qualified privilege and Plaintiffs fail to provide evidence
 2 that could reasonably support a finding the Defendants abused that privilege.

3 2. Substantive or Procedural Due Process Claim Under 42 U.S.C. §1983

4 In order to maintain an action for depravation of civil rights under 42 U.S.C. § 1983,
 5 the Plaintiffs must show they were deprived of a constitutional right by a state actor. It is not
 6 disputed that Defendants acted under the color of state law as employees of a state agency.
 7 Plaintiffs claim both substantive and procedural due process violations. First, they assert
 8 Defendants have violated their constitutional right to maintain familial bond with their
 9 grandchildren. Response, docket no. 32 at 9. Second, Plaintiffs assert they were deprived of
 10 procedural due process because they “were not given any notice and opportunity to be heard
 11 in their own defense when decisions were being made by defendants regarding plaintiff’s
 12 [sic] suitability as a placement resource for their grandchildren.” Id.

13 Plaintiffs state that under Moore, grandparents have a constitutional right to be in
 14 contact with their grandchildren. Moore v. City of East Cleveland, 431 U.S. 492, 503, 97 S.
 15 Ct. 1932, 52 L. Ed. 2d 531 (1977). Moore involves a housing law that limited grandparents
 16 from living with extended family. Id. However, the Ninth Circuit has refused to extend
 17 Moore to provide a substantive right for a grandparent to adopt or have visitation with their
 18 grandchildren based on biology alone. See Mullins v. Oregon, 57 F.3d 789 (9th Cir. 1995);
 19 Miller v. California, 355 F.3d 1172 (9th Cir. 2004). The Ninth Circuit has clearly
 20 distinguished the right to live as a familial unit and the right to adopt or visit grandchildren
 21 and declined to find a liberty interest in the latter. Id. Even when a close relationship
 22 between grandparents and their grandchildren existed, the court found the relationship
 23 between grandparents and their grandchildren “conferred no other, or weightier interest of
 24 constitutional dimension.” Miller, 355 F.3d at 1176.³

25
 26 ³ Defendants also rely on Graham v. Children’s Services Division, which held “grandparents
 do not have a liberty or property interest in their grandchildren as prospective adoptive

1 In this case the Plaintiffs do not have a protectable liberty interest at stake nor have
 2 the Plaintiffs been deprived of process due them. As evidenced by all prior state court
 3 custody decisions affirming the placement decision, DSHS has provided good reasons why it
 4 is in the best interest of the children to be placed outside the Plaintiffs' home. See docket no.
 5 25 at 10-12. The Plaintiffs have not established that they are due any more process than they
 6 have already received.

7 Plaintiffs contend that because Amy Monaco requested they care for the children and
 8 state law provides that "absent good cause, the department shall follow the wishes of the
 9 natural parent regarding the placement of the child," they are entitled to a relationship with
 10 their grandchildren that cannot be deprived without due process. See Response, docket no.
 11 32 at 11; RCW 13.34.260; see also *Troxel v. Granville*, 530 U.S. 57 (2000) (Reasoning that
 12 a fit parent's decision regarding the care of her children should be given weight in visitation
 13 decisions.) Id. at 68. However, in this case the state did provide good cause why the
 14 parent's wishes should not be followed. The letter written by Ms. King to the Plaintiffs
 15 outlines a number of causes that support the placement decision. King Decl., docket no. 26.
 16 In the letter, Ms. King notes "a clear pattern of unwillingness to cooperate with members of
 17 our agency." Id. Ms. King also supports the decision not to place the children in the home
 18 because after services were recommended by social workers there was "little or no follow
 19 through by your family with [accessing] these services." Id. Finally, Ms. King supports the
 20 decision to deny visitation as necessary in order for A.M.'s mother to maintain and build
 21 their mother /daughter bond through one-on-one interaction. Id.

22 This finding of good cause to deviate from Amy Monaco's wishes was confirmed by
 23 the state court, and reconfirmed on reconsideration. The law does not provide grandparents
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 26 children." 591 P.2d 375 (1979). The case is fairly analogous and clearly distinguishes
Moore from adoption cases.

1 any additional statutory rights to more process to challenge DSHS's placement decision.⁴
 2 Additionally, the Plaintiffs are not entitled to heightened protection of the Fourteenth
 3 Amendment because no fundamental rights or liberty interests are at stake. Therefore, the
 4 due process claims under 42 U.S.C. §1983 must be dismissed.

5 3. Conspiracy to Violate Civil Rights

6 The conspiracy claim cannot stand absent a protectable liberty interest and fails for
 7 the same reasons as outlined above.

8 4. Intentional Infliction of Emotional Distress

9 Intentional infliction of emotional distress has three elements: (1) extreme and
 10 outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) severe
 11 emotional distress. Washington v. Boeing Co., 105 Wn. App. 1, 17, 19 P.3d 1041 (2000).
 12 The first element requires proof that the conduct was "so outrageous in character, and so
 13 extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as
 14 atrocious, and utterly intolerable in a civilized community." Dicomes v. State, 113 Wn.2d
 15 612, 630, 782 P.2d 1002 (1989) (internal quotations omitted). This element should go to a
 16 jury if reasonable minds could differ as to whether the action was so extreme as to result in
 17 liability. Id. However, after construing the evidence most favorably to the Plaintiffs, this
 18 claim also fails as a matter of law. After a complete review of the record, as a matter of law
 19 Defendants' actions cannot be considered "extreme and outrageous" in this case.

20 Summary judgment is not appropriate "if reasonable minds could differ on whether
 21 the conduct was sufficiently extreme to result in liability." Dicomes v. State, 113 Wn.2d
 22 612, 630, 782 P.2d 1002 (1989). When a plaintiff asserted she was called a "bitch" and a
 23 "cunt" by her managers and the court "conclude[d] that reasonable persons could deem the

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 25 ⁴Plaintiffs assert they were "not given any notice and opportunity to be heard in their own
 26 defense when decisions were being made by defendants" and contend they should have been
 allowed to "participate and defend against the false information being presented" at the
 prognostic staffing meeting. Response, docket 32 at 9.

1 employer's conduct, as set forth in the unchallenged findings, sufficiently outrageous to
 2 trigger liability." Robel v. Roundup Corporation, 148 Wn.2d 35, 51, 59 P.3d 611 (2002). In
 3 contrast, an employee who was fired from her job and alleged a management study was "an
 4 intentionally prepared false report created for the sole purpose of embarrassing, humiliating
 5 and then terminating" her did not trigger liability for outrageous conduct. Diacomes, 113
 6 Wn.2d at 630. The court noted that the employer "discharged plaintiff by privately
 7 delivering a termination letter . . . [t]his cannot be considered atrocious and intolerable in a
 8 civilized society." Id.

9 Like the plaintiff in Diacomes, the Plaintiffs in this case simply do not assert conduct
 10 that rises to a level of outrageousness sufficiently extreme to result in liability. In support of
 11 their claim, the Plaintiffs make conclusive statements that the Defendants violated state and
 12 federal law and that Defendants "refused to refer the matter for an adoption home study or
 13 otherwise fulfill the agency duties to plaintiffs . . ." Response, docket no. 32 at 11. As a
 14 matter of law, this alleged conduct is not outrageous and does not support a claim for
 15 intentional infliction of emotional distress.

16 5. Invasion of Privacy

17 The Plaintiffs allege invasion of privacy. Plaintiffs assert that "Defendants violated
 18 plaintiffs' rights to privacy by disbursing non-conviction data relating to plaintiffs contrary to
 19 the law," docket 5, ¶ 42. A restriction on disbursing non-conviction data is found in the
 20 Criminal Privacy Act, RCW 10.97. However, the Act does not apply to this case because
 21 DSHS is not a criminal justice agency and did not disburse non-conviction data. See RCW
 22 10.97; see also docket no. 37 at 8. Therefore, the claim cannot rest on a violation of the
 23 Criminal Privacy Act.

24 Plaintiffs also assert that using "unfounded or inconclusive" referrals against Plaintiffs
 25 in the placement decision would support the invasion of privacy claim, docket no. 32 at 13.
 26 But to support a claim of invasion of privacy, the Plaintiffs must show a highly offensive fact

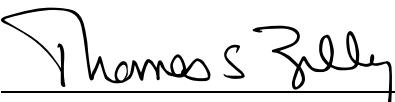
1 was “given publicity” to the general public. Restatement (Second) of Torts § 652 D.⁵ The
2 alleged disclosure in this case was made to a specialized group in making a placement
3 decision. The Restatement notes that “publicity” means “that the matter is made public, by
4 communicating it to the public at large, or to so many persons that the matter must be
5 regarded as substantially certain to become one of public knowledge.” See Restatement
6 (Second) of Torts § 652 D, note a. Disclosure during the prognostic staffing meeting did not
7 constitute publicity. In addition, the facts were related to a legitimate concern of the state,
8 which is not the type of “public disclosure” contemplated by the law. See Restatement
9 (Second) of Torts § 652 D.

10 **IV. CONCLUSION**

11 The Court GRANTS Defendants’ Motion for Summary Judgment. There is no
12 genuine issue as to any material fact and the moving party is entitled to judgment as a matter
13 of law.

14 IT IS SO ORDERED.

15 DATED this 31st day of March, 2006.

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18 Thomas S. Zilly
19 United States District Judge
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24 ⁵ The Restatement (Second) of Torts says “One who gives publicity to a matter concerning
25 the private life of another is subject to liability to the other for invasion of his privacy, if the
26 matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and
27 (b) is not of legitimate concern to the public.” Restatement (Second) of Torts § 652 D.